Hartford Faience Company *and* Local 151, International Ladies' Garment Workers Union. Case 34–CA–4691

April 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

Upon a charge and an amended charge filed on April 10 and May 4, 1990, respectively, by Local 151, International Ladies' Garment Workers Union (the Union), the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on May 21, 1990. The complaint alleges that since about October 15, 1989, the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally failing to provide employees with uniforms as required by the terms of the Respondent's collective-bargaining agreement with the Union, and by failing to make contributions to the Health and Welfare Fund and the Health Services Fund (the employee benefit funds) as required by the terms of the same agreement. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On October 1, 1990, the General Counsel, the Respondent, and the Union filed a motion to transfer proceeding to the Board and stipulation of facts. The parties agreed that the charge, the amended charge, the complaint, the answer, and the stipulation of facts constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing and the making of findings of facts and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and that they desired to submit this case for findings of facts, conclusions of law, and the issuance of an order directly by the Board.

On November 29, 1990, the Board issued an Order approving the transfer of the proceeding to the Board and accepting the parties' stipulation of facts. Thereafter, the General Counsel filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Connecticut corporation with its principal office and place of business in Hartford, Connecticut, where it has been engaged in the manufacture and nonretail sale of porcelain insulators and related products. During the 12-month period ending March 31, 1990, the Respondent sold and shipped from its Hartford facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Connecticut. The parties stipulated, and we find, that at all times material, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also stipulated, and we find, that the Union has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Stipulated Facts

Since about April 24, 1989, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the bargaining unit described below, and since that date has been recognized as the representative by the Respondent. That recognition has been embodied in a collective-bargaining agreement, which is effective by its terms for the period May 1, 1989, to April 30, 1992. The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Employer including shipping and receiving employees, and excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Since April 24, 1989, and at all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit employees for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Pursuant to the 1989–1992 collective-bargaining agreement between the Respondent and the Union, the Respondent is required, inter alia, to furnish uniforms to all employees without charge, and to pay certain moneys to the Union's Health and Welfare Fund and the Union's Health Services Fund (the employee benefit funds). These contractual requirements relate to the unit employees' wages, hours, and other terms and conditions of employment.

Since about October 15, 1989, the Respondent has failed to provide unit employees with uniforms as required by the terms of the collective-bargaining agreement, and has failed to make all the contractually required contributions to the employee benefit funds.

At a March 14, 1990 meeting between the Respondent and the Union, the Union demanded that the Respondent comply with the collective-bargaining agree-

ment. The Respondent, through its agent and president, Gerald T. McGrath, advised the Union that it was unable to provide uniforms to the unit employees and make the required contributions to the employee benefit funds because of financial difficulties. The Union did not agree, either at the March 14, 1990 meeting or at any other relevant time, to forgo the receipt of the contractually required contributions to the employee benefit funds or to permit the Respondent to withhold uniforms from its unit employees.

Discussion and Findings

The Respondent concedes that it failed to abide by the terms of the collective-bargaining agreement, and stated to the Union that its sole reason for that failure was financial difficulties. The Respondent has not filed a brief or otherwise made any other contentions regarding its failure to provide uniforms and make the required contributions to the employee benefit funds. It is well established that an employer's economic hardship is not a valid defense to a naked failure to abide by the provisions of a collective-bargaining agreement.[1] Further, an employer violates the Act when, during the term of a collective-bargaining agreement, it modifies that agreement without consent of the union.[2]

Accordingly, since the Respondent has stipulated to its failure to provide the required uniforms and make contributions to the employee benefit funds, and it has not raised a valid defense,[3] we find that by this conduct the Respondent has failed and refused to bargain collectively with the Union as the representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By failing since about October 15, 1989, to provide uniforms to the unit employees and make contributions to the employee benefit funds, as required by the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to comply with the 1989–1992 collective-bargaining agreement by providing uniforms to the unit employees, and by making the required contributions to the Health and Welfare Fund and to the Health Services Fund, retroactive to October 15, 1989.[4] The Respondent shall also reimburse its employees for any expenses ensuing from the Respondent's unlawful failure to pay contributions to the employee benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Hartford Faience Company, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 151, International Ladies' Garment Workers Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit by failing to provide uniforms to unit employees and to make contributions to the Health and Welfare Fund and to the Health Services Fund, as required by the 1989–1992 collective-bargaining agreement:

> All full-time and regular part-time production and maintenance employees employed by the Employer including shipping and receiving employees, and excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the unit employees with uniforms and make the contributions to the Health and Welfare Fund and to the Health Services Fund due since October 15, 1989, pursuant to the collective-bargaining agreement,

[1] *Universal Transfer Co.*, 266 NLRB 402 (1983); *Morelli Construction Co.*, 240 NLRB 1190 (1979).

[2] *C & S Industries*, 158 NLRB 454 (1966).

[3] In Member Oviatt's view, there may be limited circumstances in which an employer's temporary financial inability to make payments may constitute a defense to an allegation that it unilaterally and unlawfully ceased contractually required payments to union benefit funds. To make this defense successfully, an employer must establish that it continued to recognize—and did not in effect repudiate—its contractual and bargaining obligations. Thus, to satisfy this requirement, an employer must affirmatively plead and prove that its temporary nonpayment was occasioned by actual financial difficulty, and was followed by its request to meet with the union in good faith to discuss and resolve the nonpayment problem. Those requirements have not been met here. In response to the Union's demand that the Respondent comply with contractual provisions—which it failed to meet less than 6 months after the contract's effective date—the Respondent merely advised the Union that its failure was ''because of financial difficulties.'' There is no showing that the Respondent provided any corroborative evidence of the asserted financial difficulties, or that it offered to discuss and resolve the nonpayment problem that, at the time of the parties' stipulation here, had been ongoing for several months.

[4] Any additional amounts owed employee benefit funds shall be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

as set forth in the remedy section of this Decision and Order.

(b) Make whole unit employees for any losses resulting from the Respondent's failure to make contributions to the aforementioned employee benefit funds since October 15, 1989, as provided under the collective-bargaining agreement, in the manner set forth in the remedy section of this Decision and Order.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Hartford, Connecticut, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with Local 151, International Ladies' Garment Workers Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit by failing to provide uniforms to unit employees and to make contributions to the Health and Welfare Fund and to the Health Services Fund, as required by the 1989–1992 collective-bargaining agreement.

> All full-time and regular part-time production and maintenance employees employed by us including shipping and receiving employees, and excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the unit employees with uniforms and make the contributions to the Health and Welfare Fund and to the Health Services Fund that have been due since October 15, 1989.

WE WILL make whole unit employees for any losses resulting from our failure to make contributions to the aforementioned employee benefit funds since October 15, 1989, as provided under the collective-bargaining agreement, with interest.

HARTFORD FAIENCE COMPANY